



## **COMMONWEALTH of VIRGINIA**

### **DEPARTMENT OF ENVIRONMENTAL QUALITY**

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Director

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**STATE WATER CONTROL BOARD  
ENFORCEMENT ACTION - ORDER BY CONSENT  
ISSUED TO  
McCARTHY BUILDING COMPANIES, INC.  
FOR  
ESSEX SOLAR CENTER  
Virginia Pollutant Discharge Elimination System Registration No.  
VAR10J622**

#### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code §§ 62.1-44.15, 62.1-44.15:25, and 62.1-44.15:48, between the State Water Control Board and McCarthy Building Companies, Inc. regarding the Essex Solar Center for the purpose of resolving certain violations of the State Water Control Law and the applicable permit and regulations.

#### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "2014 Permit" means the General VPDES Permit for Discharges of Stormwater from Construction Activities, No. VAR10, promulgated at 9 VAC 25-880-70, which was issued under the State Water Control Law, the VSMP Regulations, and the General Permit Regulation on July 1, 2014 and which expires on June 30, 2019.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

3. "Construction activity" means any clearing, grading or excavation resulting in land disturbance of equal to or greater than one acre, or disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre.
4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
6. "Land disturbance" or "land-disturbing activity" means a man-made change to the land surface that potentially changes its runoff characteristics including clearing, grading, or excavation, except that the term shall not include those exemptions specified in Va. Code § 62.1-44.15:34.
7. "McCarthy" means McCarthy Building Companies, Inc., a corporation authorized to do business in Virginia and its affiliates, partners, and subsidiaries. McCarthy is a "person" within the meaning of Va. Code § 62.1-44.3.
8. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
9. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
10. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.
11. "Registration Statement" means a registration statement for coverage under the 2014 Permit.
12. "Site" means the Essex Solar Center located in Essex, Virginia, from which discharges of stormwater associated with construction activity occur.
13. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 et seq.) of Title 62.1 of the Va. Code.
14. "State Waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
15. "Stormwater" means precipitation that is discharged across the land surface or through conveyances to one or more waterways and that may include stormwater runoff, snow melt runoff, and surface runoff and drainage. Va. Code § 62.1-44.15:24.

16. "Virginia Stormwater Management Act" means Article 2.3 (§ 62.1-44.15:24 et seq.) of Chapter 3.1 of Title 62.1 of the Va. Code.
17. "Va. Code" means the Code of Virginia (1950), as amended.
18. "VAC" means the Virginia Administrative Code.
19. "VPDES" means Virginia Pollutant Discharge Elimination System.
20. "VSMP" means the Virginia Stormwater Management Program, which is a program approved by the Soil and Water Conservation Board after September 13, 2011, and until June 30, 2013, or the State Water Control Board on and after June 30, 2013, that has been established by a VSMP authority to manage the quality and quantity of runoff resulting from land-disturbing activities and shall include such items as local ordinances, rules, permit requirements, annual standards and specifications, policies and guidelines, technical materials, and requirements for plan review, inspection, enforcement, where authorized in this article, and evaluation consistent with the requirements of this article and associated regulations. Va. Code § 62.1-44.15:24.
21. "VSMP authority" means an authority approved by the Board after September 13, 2011, to operate a VSMP or, until such approval is given, the Department. An authority may include a locality; state entity, including the Department; federal entity; or for linear projects subject annual standards and specifications in accordance with subsection B of § 62.1-44.15-31, electric, natural gas, and telephone utility companies, interstate and intrastate natural gas pipeline companies, railroad companies, or authorities created pursuant to § 15.2-5102. Va. Code § 62.1-44.15:24.
22. "VSMP authority permit" means an approval to conduct a land-disturbing activity issued by the VSMP authority for the initiation of a land-disturbing activity after evidence of State Permit coverage has been provided where applicable. Va. Code § 62.1-44.15:24.
23. "VSMP Regulations" means the Virginia Stormwater Management Program (VSMP) Regulations, 9 VAC 25-870-10 et seq.
24. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

**SECTION C: Findings of Fact and Conclusions of Law**

1. McCarthy is the operator and permittee of the Site located in Essex County, Virginia, from which stormwater associated with construction activity is discharged.
2. DEQ is the VSMP authority for the Site.

3. On July 5, 2017, DEQ granted coverage to McCarthy under the 2014 Permit. DEQ assigned McCarthy registration number VAR10J622.
4. The 2014 Permit allows McCarthy to discharge stormwater associated with construction activities from the Site to Piscataway Creek UT and Muddy Gut (Rappahannock River Basin) in strict compliance with the terms and conditions of the 2014 Permit.
5. Piscataway Creek UT and Muddy Gut are surface waters located wholly within the Commonwealth and are "state waters" under the State Water Control Law.
6. During inspections on August 8, August 14, August 22, August 31, and September 6, 2017, DEQ staff visited the Site and observed disturbed areas upslope of proposed sediment trapping measures prior to those controls being made functional in accordance with the approved erosion and sediment control plan.

9 VAC 25-840-40(4) states: "Sediment basins and traps, perimeter dikes, sediment barriers and other measures intended to trap sediment shall be constructed as a first step in any land disturbing activity and shall be made functional before upslope land disturbance takes place."

9 VAC 25-870-54(B) states: "An erosion and sediment control plan consistent with the requirements of the Virginia Erosion and Sediment Control Law and regulations must be designed and implemented during construction activities. Prior to land disturbance, this plan must be approved by either the VESCP authority or the department in accordance with the Virginia Erosion and Sediment Control Law and attendant regulations."

7. During inspections on August 22, August 31, and September 6, 2017, DEQ staff observed that temporary stabilization was not applied within seven days to denuded areas that remained dormant or were going to remain dormant for longer than 14 days.

9 VAC 25-840-40(1) states: "Permanent or temporary soil stabilization shall be applied to denuded areas within seven days after final grade is reached on any portion of the site. Temporary soil stabilization shall be applied within seven days to denuded areas that may not be at final grade but will remain dormant for longer than 14 days. Permanent stabilization shall be applied to areas that are to be left dormant for more than one year."

9 VAC 25-870-54(B) states: "An erosion and sediment control plan consistent with the requirements of the Virginia Erosion and Sediment Control Law and regulations must be designed and implemented during construction activities. Prior to land disturbance, this plan must be approved by either the VESCP authority or the department in accordance with the Virginia Erosion and Sediment Control Law and attendant regulations."

Permit Part II(A)(2)(c)(8) states: "A properly implemented erosion and sediment control plan... ensures that stabilization of disturbed areas will be initiated immediately whenever any clearing, grading, excavating, or other land-disturbing activities have been

permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 days..."

8. During inspections on August 8, August 14, August 22, August 31, and September 6, 2017, DEQ staff observed earthen structures (such as diversions) that were not stabilized immediately after installation.

9 VAC 25-840-40(5) states: "Stabilization measures shall be applied to earthen structures such as dams, dikes and diversions immediately after installation."

9 VAC 25-870-54(B) states in part: "An erosion and sediment control plan consistent with the requirements of the Virginia Erosion and Sediment Control Law and regulations must be designed and implemented during construction activities."

9. During the inspection on September 6, 2017, DEQ staff observed concentrated runoff from sediment basins being discharged onto fill slopes and the discharge was not contained in an adequate temporary or permanent channel, flume or slope drain structure.

9 VAC 25-840-40(8) states: "Concentrated runoff shall not flow down cut or fill slopes unless contained within an adequate temporary or permanent channel, flume or slope drain structure."

9 VAC 25-870-54(B) states in part: "An erosion and sediment control plan consistent with the requirements of the Virginia Erosion and Sediment Control Law and regulations must be designed and implemented during construction activities."

10. The Department has not issued coverage under any permit or certificate to McCarthy other than under the 2014 Permit.
11. Based on the results of the August 8, August 14, August 22, August 31, and September 6, 2017 inspections, the Board concludes that McCarthy violated 9 VAC 25-870-54(B), 9 VAC 25-840-40(1), 9 VAC 25-840-40(4), 9 VAC 25-840-40(5), 9 VAC 25-840-40(8), and the conditions of 2014 Permit Part II(A)(2)(c)(8) as described in paragraphs C(6)-(9) of this Order.
12. PRO issued Warning Letters and a Notice of Violation for the violations noted above as follows: WL No. 2017-08-P-304, issued August 14, 2017 and NOV No.2017-09-P-201 issued September 25, 2017.
13. McCarthy responded to the inspection reports, Warning Letter and Notice of Violation by submitting responses detailing corrective actions that McCarthy had taken or planned to take to address the violations.
14. On October 25, 2017, Department staff met with representatives of McCarthy to discuss the violations, including McCarthy's written response.

15. McCarthy has submitted documentation that verifies that the violations as described in paragraphs C(6)-(9) above, have been corrected.

**SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, 62.1-44.15:25, and 62.1-44.15:48, the Board orders McCarthy and McCarthy agrees to: pay a civil charge of \$9,100 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

McCarthy shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Stormwater Management Fund. If the Department has to refer collection of moneys due under this Order to the Department of Law, McCarthy shall be liable for attorneys' fees of 30% of the amount outstanding.

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of McCarthy for good cause shown by McCarthy, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 et seq., after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. 2017-09-P-201 dated September 25, 2017 and Warning Letter No. 2017-08-P-304 dated August 14, 2017. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, McCarthy admits to the jurisdictional allegations, and agrees not to contest, but does not admit, the findings of fact and conclusions of law contained herein.
4. McCarthy consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. McCarthy declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by McCarthy to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. McCarthy shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. McCarthy shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. McCarthy shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and McCarthy. Nevertheless, McCarthy agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

- a. The Director or his designee terminates the Order after McCarthy has completed all of the requirements of the Order;
- b. McCarthy petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
- c. The Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to McCarthy.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve McCarthy from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

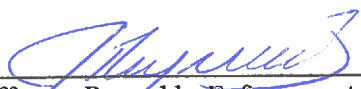
12. Any plans, reports, schedules or specifications attached hereto or submitted by McCarthy and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of McCarthy certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind McCarthy to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of McCarthy.

14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By its signature below, McCarthy voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 5th day of March, 2018.

  
Jefferson Reynolds, Enforcement Director  
Department of Environmental Quality

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McCarthy Building Companies, Inc. voluntarily agrees to the issuance of this Order.

Date: 12/20/17 By: Matt McMullan, Project Director  
(Person) (Title)  
McCarthy Building Companies, Inc.

State of Georgia  
~~Commonwealth of Virginia~~  
City/County of Cobb

The foregoing document was signed and acknowledged before me this 20th day of  
December, 20 17, by Matt McMullan who is  
project director of McCarthy Building Companies, Inc. on behalf of the  
corporation.

Sandra H. Varnum  
Notary Public

Registration No. \_\_\_\_\_

My commission expires: August 4, 2019

Notary seal:

